United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

Date: February 5, 1998

Case No: 96 INA 406

In the Matter of:

LTL INTERNATIONAL,
Employer

on behalf of

ROMEO E. SHOUKRY,
Alien

Appearances:

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of ROMEO E. SHOUKRY, (Alien) filed by **LTL INTERNATIONAL** (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at Atlanta, Georgia, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

On November 11, 1994, the Employer applied for alien labor certification on behalf of the Alien as a "programmer/systems analyst" in its business as a Freight Consolidator. AF 53.[3] Employer offered a salary of $27,071.00 a year for this 40 hour a week position.[4] The specified job duties were the following:

> Plan, develop, test & document computer programs, applying knowledge of programming techniques & computer systems for freight company. Analyze test runs & correction of coded programs & input data, develop new systems to improve workflow,

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The position was classified under DOT Occupational Code under No. **030.162-014 PROGRAMMER- ANALYST** (profess. & kin.) alternate titles: applications programmer-analyst Plans, develops, tests, and documents computer programs, applying knowledge of programming techniques and computer systems: Evaluates user request for new or modified program, such as for financial or human resource management system, clinical research trial results, statistical study of traffic patterns, or analyzing and developing specifications for bridge design, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities. Consults with user to identify current operating procedures and clarify program objectives. Reads manuals, periodicals, and technical reports to learn ways to develop programs that meet user requirements. Formulates plan outlining steps required to develop program, using structured analysis and design. Submits plans to user for approval. Prepares flow charts and diagrams to illustrate sequence of steps program must follow and to describe logical operations involved. Designs computer terminal screen displays to accomplish goals of user request. Converts project specifications, using flow charts and diagrams, into sequence of detailed instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages. Enters program codes into computer system. Enters commands into computer to run and test program. Reads computer printouts or observes display screen to detect syntax or logic errors during program test, or uses diagnostic software to detect errors. Replaces, deletes, or modifies codes to correct errors. Analyzes, reviews, and alters program to increase operating efficiency or adapt to new requirements. Writes documentation to describe program development, logic, coding, and corrections. Writes manual for users to describe installation and operating procedures. Assists users to solve operating problems. Recreates steps taken by user to locate source of problem and rewrites program to correct errors. May use computer-aided software tools, such as flow chart design and code generation, in each stage of system development. May train users to use program. May oversee installation of hardware and software. May provide technical assistance to program users. May install and test program at user site. May monitor performance of program after implementation. May specialize in developing programs for business or technical applications. GOE: 11.01.01 STRENGTH: S GED: R5 M5 L5 SVP: 7 DLU: 90

[4]The wages offered did not provide overtime compensation.

> prepare charts & diagrams to specify program & user operations, & write instructional manuals on program development. Must have proficiency in software & hardware platforms: HP-3000, HP-9000, GUPTA, MultiTech Multiplexer, Novell 3.1, UNIX OS Cobol, C and C++ languages.

The educational requirement was a baccalaureate degree in science majoring in computer programming, plus one year of training in "Computer Science & Information Systems" and one year of experience in the job offered. The worker would supervise four employees in this position. AF 53.

Notice of Findings. On March 21, 1996, the CO's Notice of Findings (NOF) denied certification, subject to the Employer's rebuttal. AF 24. The CO found that the Alien did not have the training required by the Employer, and that the Employer had not documented its minimum acceptable requirements for the job, as required by 20 CFR § 656.21(b)(5).[5] AF 24.

Rebuttal. The rebuttal evidence Employer filed on April 5, 1996, included copies of the Alien's diploma and transcripts for a degree of Master of Science in Computer Science. The Employer contended the Alien's studies leading to this graduate degree in computer science equalled the requisite two years of training or experience specified by the application in ETA 750A. Employer supported this argument by observing that the Technical Assistance Guide to the DOT said that such training may be received in a school, work, military, institutional, or in a vocational environment. In support of its argument the Employer cited and quoted from a memorandum by the Administrator for Regional Management of the Division of Foreign Labor Certifications[6], who said that,

> The years of specific vocational preparation to be credited for a Master's or a Doctorate [degree] should be based on the time it would generally take a person to earn the degree in question from a graduate school in the United States, if a person matriculated towards the degree on a full-time basis.

AF 16. The Employer cited as authority **Mindcraft Software, Inc.,** 90 INA 328 (Oct.2, 1991), in which a BALCA panel observed that in evaluating a Master's degree in administering Specific Vocational Preparation (SPV), the Department of Labor treated the time a U. S. job applicant needed to learn the techniques, acquire the necessary information, and develop the facility needed for average performance of the job as equal to two years of experience that the employer in that case required.

While the CO drew a distinction between "education" and "training" in the NOF, the Employer's rebuttal evidence and argument did not address this dichotomy, saying only,

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[5]The CO did not determine whether or not the alien had met the one year experience requirement also included in the job offer.

[6]Interpreter Releases, Vol. 71, No. 11 (March 21, 1994).

> Thus, it is clear that the Master's degree in Computer Science held by the alien is equivalent to two years of training (or experience) where only year was required.

AF 16.[7]

Final Determination. Certification was denied in the CO's April 23, 1996, Final Determination. AF-13. The CO concluded that the Employer did not meet the requirements of 20 CFR Part 656 and that there are U. S. workers available who are able, willing, and qualified for the job. After reviewing the Rebuttal evidence, the CO restated the NOF finding that the Alien did not have the one year of training in Computer Science & Information Systems that the Employer's application required, concluding for this reason that Employer had failed to document its actual minimum requirements. Noting that the Alien had attended Barry University for two years and had been awarded a Master of Science degree in Computer Science, the CO observed that the Employer's ETA 750A required a one year training program and said that the courses leading to this graduate degree were "an education program and not training." Concluding that the Employer had not documented its actual minimum requirements for this reason, the CO denied certification. AF 13-14.

Appeal. The Employer requested administrative judicial review on May 28, 1996. AF 01. With its request for review, it also filed proposed additions to the evidential record to prove the Alien's training and experience.[8]

Discussion

The issue Employer's appeal presents is whether the Alien's studies to earn an advanced degree in computer science equals the one year of training and one year of experience that Employer's job offer specified. The Employer's Rebuttal contended but gave no reasons to support an inference that the two years the Alien studied for a master's degree in computer science is equal to the one year training plus one year experience that its application had specified as a hiring criterion. As the NOF and Final Determination challenged the Employer's requirement of one year's "Training" in "Computer Science & Information Systems" but did not discuss the Employer's requirement of "Experience in the Job Offered," the panel must determine whether the two years during which the Alien studied for a master of science degree met the one year of experience plus one year of training that the Employer required.

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[7] It follows that the Employer's Rebuttal did not respond to a basic issue that the CO identified in the NOF.

[8] The additional evidence of the alien's experience and training in addition to the master's degree in computer science that the Employer filed with the appeal cannot be considered because the regulations require the Board to review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any statements of position or legal briefs. Consequently, the items of evidence that the Employer withheld until after the final determination cannot be considered by BALCA in this appeal. **Capriccio's Restaurant**, 90 INA 480 (Jan.7, 1992).

It is well-established that the employer must establish that the alien possesses the stated minimum requirement for the position. **Charley Brown's**, 90 INA 345 (Sep. 17, 1991). The employer may not require more experience of U. S. workers than the alien offrers, however. **Western Overseas Trade and Development Corp**., 87 INA 640 (Jan. 27, 1988). Certification is properly denied under 20 CFR 656.21(b)(6) where the alien does not meet the employer's stated job requirements. **Marston & Marston, Inc.**, 90 INA 373 (Jan. 7, 1992).
Even though BALCA held in **Lebanese Arak Corp.**, 87 INA 683 (Apr. 24, 1989)(*en banc*), that the DOT job requirements are evidence that the position description is not unduly restrictive, this holding does not control the disposition of this case, where the issue turns on the application of DOT Appendix C and not the occupational description in the evidence of record.[9] In Appendix C the DOT defined the Specific Vocational Preparation (SVP) as the amount of time that is required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job. The DOT explained that,

> This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

This case. The issue to be determined in this case relates to the further provision of Appendix C that the requisite training may be acquired in a school, work, military, institutional, or vocational environment, and that the SVP includes vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.[10] The brief filed by the Employer argued that the Alien's Master of Science degree was "equivalent to two (2) years of training (or experience) where only one year was actually required" by the application for alien labor certification. Employer's argument relied on an affidavit attesting (1) that its specific job requirements were as it stated in the application, (2) that they are necessary and essential to its freight consolidation business, and (3) that the Alien meets its minimum requirements.

Garland. Employer relied on **Garland Community Hospital**, 89 INA 271 (June 20, 1991), in which an offer of systems analyst position was evaluated by the BALCA panel and found to include the "alien's college degree in regard to *training* time." (Emphasis as in original.) This citation does not control the disposition of the instant case, as the CO in **Garland** applied 20 CFR § 656.21(b)(2) to evaluate the training of U. S. job applicants, which was found to be

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[9]The SVP level of specific vocational preparation applicable to DOT Occupational Code No. 030.162-014 PROGRAMMER-ANALYST was 7, which required a period of "Over 2 years up to and including 4 years."

[10]Appendix C defined on-the-job training as "serving as learner or trainee on the job under the instruction of a qualified worker;" and the DOT defined essential experience in other jobs as "serving in less responsible jobs that lead to the higher grade job or serving in other jobs that qualify."

adequate in deciding whether or not the candidates for that job were rejected for reasons that were neither job related nor lawful. As this holding explicitly addressed the status and qualifications of U. S.workers and not of the alien, it is clear that the alien's own training was not at issue in that case, and the facts presented in the **Garland** decision do not apply to this application.

Kellogg. This reasoning is consistent with the Board's holding in **Francis Kellogg, *et als.***, 95 INA 068 , 94 INA 544, 95 INA 068 (Feb. 2, 1998)(*en banc*), where the BAL|CA recently considered the use of alternative experience requirements. (1) We first held in **Kellogg** that any job requirements listed by an employer on the ETA Form 750A, including alternative requirements, must be read together as the employer's stated minimum require-ments which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the DOT, and shall not require a language other than English. 20 CFR § 656.21(b)(2). While there are legitimate alternative job requirements, that can and should be permitted in the labor certification process, such alternative hiring standards must be treated as substantially equal to each other in deciding whether a U. S. worker seeking the job can perform in a reasonable manner the duties of the position being offered. It follows that an employer's alternative hiring standard can be considered normal under 20 CFR § 656.21(b)(2) in a case where (a) employer's primary job requirement is considered normal for the position in the United States and (b) that alternative requirement is found to be substantially equal to that primary criterion in determining whether an applicant can perform in a reasonable manner the duties of the job offered. (2) Secondly, we held in **Kellogg** that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are regarded as unlawfully tailored to the alien's qualifications in violation of 20 CFR § 656.21(b)(5) unless the employer has indicated that all candidates for the job whose qualifications offer any suitable combination of education, training or experience are acceptable. **Francis Kellogg, *et als.***, *supra*.

Applying **Kellogg** to the instant case, even if the panel were to assume that the four year college curriculum specified in the educational requirement is equal to the four years of specific vocational preparation noted in the DOT, examination of the record fails to disclose the Employer's object in requiring one year of experience in the Job Offered in addition to the baccalaureate degree it requires.[11] As a result, Employer's experience requirement is vague, and its rebuttal failed to proffer sufficient evidence to support the finding that this Alien's studies for the degree of Master of Science were, in fact, equal to one or more years of "experience" in qualifying for this job. While on the one hand, the Employer might be expected to know whether or not such a degree was, in fact, equal in nature and length to the one year of experience it had specified, the panel cannot accept Employer's unsupported construction of the

[11]Although that four year period was equal to the time needed to earn a baccalaureate degree in this case, the CO did not challenge as excessive Employer's added job requirement that the worker have one year of "experience" in the Position Offered, which is consistent with the history noted by the panel without comment in **Marston & Marston, Inc.**, *supra*.

record with these regulations as definitive, as this would ignore the possibility that the Employer's criteria for the position were tailored to the Alien's own qualifications, which would treat the Alien more favorably than Employer would treat the job application of a U. S. worker. **ERF, Inc., dba Bayside Motor Inc.**, 89 INA 105 (Feb. 14, 1990); 20 CFR § 656.21(b)(6).

Summary. While the experience that the Employer intended to require in its application is relevant to and essential to the determination of this matter, the Employer has not disclosed what the worker was supposed to learn in his one year of exposure to the duties of job at issue that would equip him for the position. Employer did not explain why an equal period of time in studies for an advanced degree would be sufficient to equip the Alien to perform the work required. It follows that the CO must complete the record by causing the Employer to relate the skills a worker would acquire in the one year of experience to the work to be performed on this job. The CO must then determine whether or not the studies the Alien carried on in earning a degree of Master of Science were, in fact, adequate to substitute for the experience that the Employer required of the U. S. workers applying for this position.

Accordingly, the following order will enter.

ORDER

1. The Certifying Officer's denial of labor certification is hereby vacated.

2. This matter remanded to the Certifying Officer. The Certifying Officer for the purpose of issuing a further Notice of Finding and for such added proceedings as will be necessary to complete the record.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.